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No. 96-1671

In the Supreme Court of the United States

OCTOBER TERM, 1996

FRANKLIN D. RAINES, ET AL., APPELLANTS

v.

ROBERT C. BYRD, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLANTS

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QUESTIONS PRESENTED

The Line Item Veto Act, Pub. L. No. 104-130, 110 Stat. 1200 (to be codified at 2 U.S.C. 691 *et seq.*), gives the President conditional authority to cancel certain spending and revenue items within five days after a bill containing such items has been enacted into law. The questions presented are as follows:

1. Whether individual Members of Congress have standing to challenge the constitutionality of the Act.

2. Whether the Act violates Article I of the Constitution.

PARTIES TO THE PROCEEDINGS

The appellants here, who were the defendants in the district court, are Franklin D. Raines, the Director of the Office of Management and Budget, and Robert E. Rubin, the Secretary of the Treasury. The appellees here, who were the plaintiffs below, are Senator Robert C. Byrd, Senator Daniel Patrick Moynihan, Senator Carl Levin, former Senator Mark O. Hatfield, Representative David E. Skaggs, and Representative Henry A. Waxman.

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OPINION BELOW

The opinion of the district court (J.S. App. 1a-29a) is to be reported at 956 F. Supp. 25.

JURISDICTION

The order of the district court was entered on April 10, 1997. A notice of appeal (J.S. App. 30a-31a) was filed on April 11, 1997. This Court noted probable jurisdiction on April 23, 1997. J.A. 108. The jurisdiction of this Court rests on Pub. L. No. 104-130, § 3(b), 110 Stat. 1211 (J.S. App. 57a) (to be codified at 2 U.S.C. 692(b)).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Presentment Clause of the United States Constitution, Art. I, § 7, Cl. 2, is reproduced as an appendix to this brief.

2. The Line Item Veto Act, Pub. L. No. 104-130, 110 Stat. 1200 (to be codified at 2 U.S.C. 691 *et seq.*), is reproduced at J.S. App. 32a-59a.

STATEMENT

1. The Line Item Veto Act gives the President conditional authority to cancel certain spending and revenue items within five days after a bill containing such items has been enacted into law. The Act is the latest in a series of statutes, dating from 1789 to the present, in which Congress has given the Executive Branch discretion over the expenditure of appropriated funds.

a. The first statute appropriating funds for the general operation of the federal government was passed by the First Congress and signed by President Washington in September 1789. See Act of Sept. 29, 1789, ch. 23, § 1, 1 Stat. 95. The statute appropriated "sum[s] not exceeding" specified amounts for the expenses of the War Department, government salaries, military pensions, and outstanding debt. *Ibid.* The First Congress subsequently enacted two additional general appropriations statutes, which likewise appropriated "sum[s] not exceeding" specified amounts for the government's operations. Act of Mar. 26, 1790, ch. 4, § 1, 1 Stat. 104; Act of Feb. 11, 1791, ch. 6, § 1, 1 Stat. 190. See Ralph S. Abascal & John R. Kramer, *Presidential Impoundment Part I: Historical Genesis and Constitutional Framework*, 62 Geo. L.J. 1549, 1579 (1974).

The appropriations acts of the First Congress gave the President two distinct kinds of discretion over appropriated funds, both of which have become familiar elements of the federal budget process. First, by appropriating sums "not exceeding" specified amounts, Congress gave the President discretion not to obligate the full amount of the appropriations. It has since become a commonplace of

federal appropriations law that an appropriation "not exceeding" a specified sum leaves the Executive Branch with discretion to spend less than the full amount of the appropriation, absent some other statutory restriction on that discretion. See, *e.g.*, H.R. Rep. No. 1797, 81st Cong., 2d Sess. 9 (1950) ("Appropriation of a given amount for a particular activity constitutes only a ceiling upon the amount which should be expended for that activity."); 89 Cong. Rec. 10,362 (1943) (Sen. Truman) ("When the Congress appropriates funds * * * none of us hold[s] that we give a mandate to expend the funds appropriated.").

Second, the appropriations acts of the First Congress provided Executive Branch departments with what are now known as "lump-sum" appropriations—that is, appropriations for the operation of a department that do not specify the particular items for which the funds are to be used. For example, the first appropriations act appropriated "a sum not exceeding one hundred and thirty-seven thousand dollars for defraying the expenses of the department of war." Act of Sept. 29, 1789, ch. 23, § 1, 1 Stat. 95. The Act did not prescribe any particular expenditures to be made by the President from that appropriation. As a result, the President was given discretion not only with respect to the amount of the appropriated sum that would be used, but also with respect to its allocation within the Department of War. This Court recently reaffirmed that, "where Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that [Congress] does not intend to impose legally binding restrictions" on the allocation of the funds among authorized purposes. *Lincoln* v. *Vigil*, 508 U.S. 182, 192 (1993) (internal quotation marks omitted).

Within a few years, appropriations laws began to make increased use of earmarked, rather than lump-sum, appro-

priations. See Abascal & Kramer, 62 Geo. L.J. at 1579-1580. However, Congress soon recognized the continued need to provide the Executive Branch with discretion to move appropriations within departments. In 1809, Congress vested the President with recess authority "to direct * * * that a portion of the monies appropriated for a particular branch of expenditure in [a] department, be applied to another branch of expenditure in the same department." Act of Mar. 3, 1809, ch. 28, § 1, 2 Stat. 535-536. That authority remained in effect, with various modifications, for nearly 60 years. See Louis Fisher, *Presidential Spending Discretion and Congressional Controls*, 37 Law & Contemp. Probs. 135, 148 & nn.71-72 (1972). In addition, Congress continued to resort to lump-sum appropriations, rather than earmarked appropriations, when Executive Branch discretion and flexibility were viewed as desirable, particularly during periods of economic and military crisis. *Id.* at 136 (citing major lump-sum appropriations during Civil War, First World War, and Great Depression).

Early in the Twentieth Century, Congress began to enact laws that gave the Executive Branch standing authority to control spending on a government-wide basis. In 1905 and 1906, Congress amended the Antideficiency Act (Act of July 12, 1870, ch. 251, § 7, 16 Stat. 251) to give agencies authority to apportion appropriations over the course of a fiscal year, while authorizing them to modify or waive apportionments in exigent circumstances. Act of Mar. 3, 1905, ch. 1484, § 4, 33 Stat. 1257-1258; Act of Feb. 27, 1906, ch. 510, § 3, 34 Stat. 48-49.

In 1933, in response to the fiscal pressures created by the Great Depression, Congress granted the President broad discretion to refrain from spending appropriated funds. Congress authorized the President to "reduce [governmental] expenditures" by abolishing, consolidating, or transferring Executive Branch agencies and functions.

Act of Mar. 3, 1933, ch. 212, § 16, 47 Stat. 1517-1519 (amending Act of June 30, 1932, ch. 314, §§ 401-408, 47 Stat. 413-415)). All appropriations "unexpended by reason of" the President's exercise of his reorganization authority were to be "impounded and returned to the Treasury." *Id.* at 1519. Congress also conferred discretionary impoundment authority in the Department of War's 1933 appropriations act. Congress authorized the President to impound "[a]ny sums appropriated in this Act for or on account of the Military Establishment, or any portion of such sums, that may not be needed for the purposes for which appropriated." Act of Mar. 4, 1933, ch. 281, § 4, 47 Stat. 1602.

In 1950, Congress amended the Antideficiency Act to provide the Executive Branch with general authority to establish "reserves"—that is, to withhold appropriated funds—in order "to provide for contingencies, or to effect savings whenever savings are made possible by or through changes in requirements, greater efficiency of operations, or other [post-appropriation] developments." General Appropriation Act, 1951, ch. 896, § 1211, 64 Stat. 765-766 (1950). Congress directed the Executive Branch to "recommend the rescission" of any reserves "not * * * required to carry out the purposes of the appropriation concerned." *Id.* at 766. Congress also authorized the Executive Branch to reduce spending by "at least" $550 million below appropriated levels; apart from specifying that the reductions not "impair[] national defense," Congress did not prescribe what spending to reduce or how large particular reductions should be. *Id.* § 1214, 64 Stat. 768.

During the Vietnam War, Congress gave the President still greater discretionary authority over expenditures of appropriated funds. See Abascal & Kramer, 62 Geo. L.J. at 1569 & n.90; Fisher, 37 Law & Contemp. Probs. at 160-

161. The Revenue and Expenditure Control Act of 1968 imposed strict ceilings on budget outlays and new obligation authority for fiscal year 1969. Pub. L. No. 90-364, §§ 202(a), 203(a), 82 Stat. 271-272. To meet those ceilings, Congress authorized the President to reserve as much as $6 billion in outlays and $10 billion in new obligation authority, with no restrictions on the President's discretion regarding what spending to reduce. *Id.* §§ 202(b), 203(b), 82 Stat. 272. Congress provided the President with similar authority in 1969 and 1970. See Second Supplemental Appropriations Act, 1969, Pub. L. No. 91-47, § 401, 83 Stat. 82; Second Supplemental Appropriations Act, 1970, Pub. L. No. 91-305, §§ 401, 501, 84 Stat. 405-407.

b. In each of the foregoing instances, the Executive Branch was authorized by statute to withhold appropriated sums. During the early 1970s, however, President Nixon asserted a general authority to impound appropriated funds whether or not Congress intended for the impounded appropriations to be discretionary. See, *e.g.*, 9 Weekly Comp. Pres. Doc. 110 (1973). The Nixon Administration's effort to impound appropriations for a wide range of federal programs led to a series of lawsuits challenging individual impoundments. See, *e.g.*, *City of New Haven* v. *United States*, 634 F. Supp. 1449, 1454-1455 & n.6 (D.D.C. 1986) (summarizing cases), aff'd, 809 F.2d 900 (D.C. Cir. 1987); Ralph S. Abascal & John R. Kramer, *Presidential Impoundment Part II: Judicial and Legislative Responses*, 63 Geo. L.J. 149, 151-168 (1974); Nile Stanton, *History and Practice of Executive Impoundment of Appropriated Funds*, 53 Neb. L. Rev. 1, 14-30 (1974).

The courts resolved disputes over Executive Branch impoundments by construing the applicable appropriations statutes to determine whether Congress intended for the President to have discretion over expenditure of the

impounded funds. For example, in *Train* v. *City of New York*, 420 U.S. 35 (1975), this Court held that the President lacked authority to impound funds appropriated for grants under Title II of the Federal Water Pollution Control Act, as added by Pub. L. No. 92-500, § 2, 86 Stat. 833. The Court reviewed the text and history of the Act to determine whether "Congress intended to confer any discretion on the Executive to withhold funds from this program." 420 U.S. at 44. The Court and the parties presupposed that Congress could, if it chose, vest the Executive Branch with such discretion; the only issue was whether it had chosen to do so.

In response to the impoundment controversy, Congress enacted the Impoundment Control Act of 1974 (ICA), Pub. L. No. 93-344, Tit. X, 88 Stat. 332 (codified as amended at 2 U.S.C. 681 *et seq.*). The ICA distinguished between two forms of impoundment: deferrals (delays in spending during the course of a fiscal year, or other period of availability) and rescissions (permanent withholdings of appropriated funds). See 2 U.S.C. 682(1), 682(3). The Act authorized the President to carry out deferrals, subject to a one-House legislative veto. 2 U.S.C. 684 (1982).[1] The Act prohibited the President from engaging in unilateral rescissions. Instead, it authorized the President to propose rescissions to Congress under a mechanism for expedited legislative consideration. 2 U.S.C. 683 (1982). In addition, the Act amended the Antideficiency Act to narrow the circumstances in which the Executive Branch

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[1] This Court's decision in *INS* v. *Chadha*, 462 U.S. 919 (1983), made clear that the ICA's legislative veto provision was unconstitutional. See *City of New Haven* v. *United States*, 809 F.2d 900, 905 (D.C. Cir. 1987) (government conceded unconstitutionality of legislative veto provision). Congress subsequently amended the Act to eliminate that provision. Act of Sept. 29, 1987, Pub. L. No. 100-119, § 206(a), 101 Stat. 785-786.

could place appropriated funds in reserves. See ICA § 1002, 88 Stat. 332.

2. The Line Item Veto Act was enacted in April 1996 as an amendment to the ICA. See Pub. L. No. 104-130, 110 Stat. 1200 (J.S. App. 32a-59a) (to be codified at 2 U.S.C. 691 *et seq.*). The Act expires on January 1, 2005. Pub. L. No. 104-130, § 5, 110 Stat. 1212 (J.S. App. 59a). It authorizes the President to "cancel in whole" specific spending and revenue items contained in any bill or joint resolution "that has been signed into law pursuant to Article I, section 7, of the Constitution of the United States." ICA § 1021(a) (2 U.S.C. 691(a)); J.S. App. 32a.[2]

The President's cancellation authority extends to three categories of budget items: (1) "dollar amount[s] of discretionary budget authority," (2) "item[s] of new direct spending," and (3) "limited tax benefit[s]." ICA § 1021(a) (2 U.S.C. 691(a)); J.S. App. 32a-33a. A "dollar amount of discretionary budget authority" is "the entire dollar amount of budget authority" that is specified in an appropriations law or is otherwise specified, represented, or required to be spent. ICA § 1026(7)(A) ((2 U.S.C. 691e(7)(A)); J.S. App. 50a-51a.[3] An "item of new direct spending" is a

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[2] Section 2 of the Line Item Veto Act added a new Part C to the ICA. The citations in the text to "ICA §" are to Sections contained in the new Part C.

[3] A "dollar amount of discretionary budget authority" includes any amount "represented separately in any table, chart, or explanatory text included in the statement of managers or the governing committee report accompanying [an appropriations] law." ICA § 1026(7)(A)(ii) (2 U.S.C. 691e(7)(A)(ii)); J.S. App. 50a. That provision "is not intended to give increased legal weight or authority to documents that accompany the law that is enacted." H.R. Conf. Rep. No. 491, 104th Cong., 2d Sess. 32 (1996). Rather, Congress "is choosing to use those documents as a means of allowing the President increased discretion to reduce dollar amounts of discretionary budget authority provided in an appropriation law." *Ibid.*

specific provision that will result in "an increase in budget authority or outlays" for entitlements, food stamps, or other programs funded other than through annual appropriations. ICA § 1026(8) (2 U.S.C. 691e(8)); J.S. App. 51a.[4] A "limited tax benefit" is a revenue-losing provision that gives a tax reduction to 100 or fewer beneficiaries, or a provision that provides "temporary or pemanent transitional relief" to ten or fewer beneficiaries. ICA § 1026(9)(A) (2 U.S.C. 691e(9)(A)); J.S. App. 52a-54a.[5]

Cancellation of a dollar amount of discretionary budget authority operates "to rescind" that authority. ICA § 1026(4)(A) (2 U.S.C. 691e(4)(A)); J.S. App. 48a. Cancellation of an item of new direct spending or a limited tax benefit renders the cancelled spending or revenue provision without "legal force or effect." ICA § 1026(4)(B) and (C) (2 U.S.C. 691e(4)(B) and(C)); J.S. App. 48a-49a. The President may not use funds covered by a cancellation for

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[4] The Act defines the term "direct spending" to include "(A) budget authority provided by law (other than an appropriation law); (B) entitlement authority; and (C) the food stamp program." ICA § 1026(5) (2 U.S.C. 691e(5)); J.S. App. 49a. An "item of new direct spending" is a provision of law estimated to result in direct spending in excess of the "baseline" levels calculated pursuant to Section 257 of the Balanced Budget and Emergency Deficit Control Act of 1985, 2 U.S.C. 907. See ICA § 1026(8) (2 U.S.C. 691e(8)); J.S. App. 51a; see also H.R. Conf. Rep. No. 491, *supra*, at 36. An increase in outlays for such entitlements resulting from automatic cost-of-living or comparable adjustments under *existing* law is in the "baseline" and therefore is not an item of "new" direct spending under the Line Item Veto Act.

[5] The Act provides for the Joint Committee on Taxation to identify limited tax benefits in future revenue bills. ICA § 1027(a) (2 U.S.C. 691f(a)); J.S. App. 54a. If Congress incorporates the Joint Committee's statement into a revenue law as finally enacted, the President's authority to cancel limited tax benefits is confined to the items, if any, identified in that law. ICA § 1027(b) and (c) (2 U.S.C. 691f(b) and (c)); J.S. App. 55a-56a.

any purpose other than deficit reduction. ICA §§ 1023(b), 1024 (2 U.S.C. 691b(b), 691c); J.S. App. 36a-39a. Deficit reduction is accomplished through a statutory "lockbox" procedure, under which the Director of the Office of Management and Budget (OMB) must calculate the deficit reduction from the cancellation and "lock in" the savings by adjusting the calculations submitted to Congress under the Gramm-Rudman-Hollings Act. ICA § 1024(a) and (b) (2 U.S.C. 691c(a) and (b)); J.S. App. 37a-38a.[6]

If the President wishes to exercise his cancellation authority, he must submit a special message to Congress within five calendar days (excluding Sundays) after the enactment of the law containing the cancelled item. ICA §§ 1021(a)(B), 1022(c)(1) (2 U.S.C. 691(a)(B), 691a(c)(1)); J.S.

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[6] The "lockbox" operates through the pre-established procedures in the Balanced Budget and Emergency Deficit Control Act of 1985, as amended (particularly by the Budget Enforcement Act of 1990 (BEA)), which is codified at 2 U.S.C. 900 *et seq*. The BEA imposed limits ("caps") on the annual amount of discretionary appropriations, 2 U.S.C. 901, and also imposed what is commonly referred to as a "pay-as-you-go" ("paygo") requirement for legislation affecting direct spending and receipts, 2 U.S.C. 902. A failure by Congress to stay within the discretionary "caps" and the "paygo" limitation results in a "sequester," or cancellation, of budgetary resources in excess of the caps or limitation. 2 U.S.C. 900(b), 901(a)(1), 901a(a), 902(b), 906(*l*). OMB prepares the reports on which the sequester orders are based. 2 U.S.C. 904(g) and (h). Under the Line Item Veto Act's "lockbox" provision, the President's cancellation of a dollar amount of discretionary budget authority requires OMB to reduce the discretionary caps by the same amount. ICA § 1024(a)(1)(B) (2 U.S.C. 691c(a)(1)(B)); J.S. App. 37a. When the President cancels an item of direct spending or a limited tax benefit, OMB does not include the savings from that cancellation in its "paygo" calculations. ICA § 1024(a)(2)(B) (2 U.S.C. 691c(a)(2)(B)); J.S. App. 38a. See H.R. Conf. Rep. No. 491, *supra*, at 23-24. The "lockbox" provision thereby operates to permanently reduce the amounts of budgetary resources which Congress can thereafter appropriate in any one fiscal year without triggering a sequester.

App. 33a, 35a-36a. The President may cancel an item only if he determines that doing so will "(i) reduce the Federal budget deficit; (ii) not impair any essential Government functions; and (iii) not harm the national interest." ICA § 1021(a)(A) (2 U.S.C. 691(a)(A)); J.S. App. 33a. The President must also consider "the legislative history, construction, and purposes of the law" containing the items, as well as "any specific sources of information referenced in such law." ICA § 1021(b)(1) and (2) (2 U.S.C. 691(b)(1) and (2)); J.S. App. 33a. In addition, the President's special message to Congress must identify, *inter alia*, the reasons for the cancellation; the President's estimate of the "fiscal, economic, and budgetary effect" of the cancellation; his estimate of "the * * * effect of the cancellation upon the objects, purposes and programs for which the canceled authority was provided"; and the geographic distribution of the cancelled spending. ICA § 1022(b) (2 U.S.C. 691a(b)); J.S. App. 34a-35a.

A cancellation takes effect upon Congress's receipt of the President's special message. ICA § 1023(a) (2 U.S.C. 691b(a)); J.S. App. 36a. The Act provides for highly expedited legislative consideration of "disapproval bills." ICA §§ 1025, 1026(6) (2 U.S.C. 691d, 691e(6)); J.S. App. 39a-47a, 49a-50a. If a disapproval bill is enacted into law, all disapproved cancellations become null and void and the cancelled items become effective. ICA § 1023(a) (2 U.S.C. 691b(a)); J.S. App. 36a. A disapproval bill is not subject to the President's cancellation authority under the Act. ICA § 1021(c) (2 U.S.C. 691(c)); J.S. App. 34a.

Although the Line Item Veto Act establishes general rules for the execution of appropriations laws, nothing in the Act purports to prevent Congress from exempting any future spending or revenue bill from the operation of the Act by including a provision to that effect in the bill itself.

3. The Act took effect on January 1, 1997. See J.S. App. 2a, 58a-59a. Appellees—six Members of Congress, one of whom has since left office—filed the present suit the next day.[7] They named as defendants Franklin D. Raines, the Director of OMB, and Robert E. Rubin, the Secretary of the Treasury. J.A. 9-10; see J.S. App. 2a.[8] Appellees alleged that "the Act confers on the President powers of veto, revision, and repeal of federal law that violate Article I of the Constitution." J.A. 10. They further alleged that the Act "directly and concretely injures" them by "altering the legal and practical effect" of their votes, by "divesting" them of "their constitutional role in the repeal of legislation," and by "altering the constitutional balance of powers between the Legislative and Executive Branches." J.A. 12. The complaint did not allege, however, that the President had exercised his cancellation authority under the Act, and he has not yet done so.

The government moved to dismiss for lack of jurisdiction, and the parties thereafter filed cross-motions for summary judgment. The Senate and the House of Representatives jointly appeared as *amici curiae* to support the constitutionality of the Act. See J.S. App. 2a-3a. On April 10, 1997, the district court issued a memorandum order

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[7] A similar constitutional challenge was brought by a federal labor union immediately after the Act was signed into law in April 1996. That action was dismissed on standing and ripeness grounds. See *National Treasury Employees Union* v. *United States*, 101 F.3d 1423 (D.C. Cir. 1996).

[8] Appellees alleged that "defendant Raines is responsible for executing the President's cancellations of budgetary and spending authority under the Act," and that "defendant Rubin is responsible for executing the President's cancellations of 'limited tax benefits' under the Act and for executing and enforcing the tax laws of the United States." J.A. 11.

denying the motion to dismiss and granting summary judgment to appellees. J.S. App. 1a-29a.

The district court first held that appellees had standing to bring their suit. J.S. App. 9a-12a. The court relied on prior D.C. Circuit decisions holding that Members of Congress have "standing to challenge measures that affect their constitutionally prescribed lawmaking powers," although it recognized that "the Supreme Court has never endorsed the Circuit's analysis of standing in such cases." *Id.* at 10a-11a. Applying those circuit precedents, the district court held that "[appellees'] claim of injury in this case, namely, that the Act dilutes their Article I voting power, is likewise of the kind that suffices to confer standing under Article III." *Id.* at 11a. By virtue of the Act, the court explained, "[appellees'] votes mean something different from what they meant before, for good or ill, and [appellees] who perceive it as the latter are thus 'injured' in a constitutional sense whenever an appropriations bill comes up for a vote, whatever the President ultimately does with it." *Id.* at 11a-12a.

The district court also held that appellees' claims were ripe for adjudication, despite the fact that the President had not yet exercised any cancellation authority under the Act. J.S. App. 12a-15a. The court explained that, "[b]ecause [appellees] now find themselves in a position of unanticipated and unwelcome subservience to the President before and after they vote on appropriations bills, Article III is satisfied." *Id.* at 14a. The court noted as well that "the budgetary process is already underway," and that "appropriations votes are inevitable, and 'certainly impending.'" *Ibid.* (quoting *Whitmore* v. *Arkansas*, 495 U.S. 149, 158 (1990)).[9]

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[9] Section 3(a)(1) of the Line Item Veto Act expressly authorizes suits by Members of Congress challenging the constitutionality of any

On the merits, the district court held that the Line Item Veto Act violates the Presentment Clause (U.S. Const. Art. I, § 7, Cl. 2) by delegating to the President the legislative power to repeal Acts of Congress. J.S. App. 16a-29a. The court acknowledged that any appropriations law whose provisions are subject to the President's cancellation power under the Act "will have been 'approved' in accordance with the Presentment Clause." *Id.* at 20a. The court concluded, however, that, "following approval [of an appropriations bill], a cancellation by the President is a legislative repeal that itself must comply with Presentment Clause procedures." *Ibid.* The court reasoned:

> Where the President signs a bill but then purports to cancel parts of it, he exceeds his constitutional authority and prevents both Houses of Congress from participating in the exercise of lawmaking authority. The President's cancellation of an item unilaterally effects a repeal of statutory law such that the bill he signed is not the law that will govern the Nation. That is precisely what the Presentment Clause was designed to prevent.

Id. at 21a-22a.

The district court recognized that the President may be vested with discretionary authority to impound, or to decline to spend, funds previously appropriated by Congress. J.S. App. 22a-23a. However, the court stated that cancellation under the Act "is simply not the same

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provision of the Act. J.S. App. 56a (2 U.S.C. 692(a)(1)). Section 3(c) of the Act directs both the district court and this Court to expedite disposition of such suits "to the greatest possible extent." *Id.* at 57a (2 U.S.C. 692(c)). The district court construed those provisions as rendering inapplicable any prudential constraints on the court's exercise of jurisdiction, leaving only the requirements of Article III. See *id.* at 9a n.5, 14a n.8, 16a.

thing as impoundment," but instead "is equivalent to repeal" of the underlying appropriations law. *Id.* at 24a-25a. The court sought to distinguish the Act from statutes previously upheld by this Court under the nondelegation doctrine on the ground that, in its view, the Act "hands off to the President authority over fundamental legislative choices" and "spares Congress the burden of making those vexing choices of which programs to preserve and which to cut." *Id.* at 27a.

SUMMARY OF ARGUMENT

I. Because the implementation of the Line Item Veto Act will cause appellees no judicially cognizable injury, they lack standing to sue in this case. This Court has consistently held that a generalized interest in the proper application of the Constitution and laws is an insufficient basis for invoking the power of the federal courts. Because Members of Congress exercise their official powers on behalf of the people, the President's cancellation of budgetary items pursuant to the Line Item Veto Act would cause them no personal injury that is not shared by the public generally.

Nor do appellees have standing to sue on behalf of the government. Because Article II of the Constitution entrusts litigation on behalf of the United States to the Executive rather than the Legislative Branch, neither Congress nor its Members may initiate litigation designed to vindicate the general public and governmental interest in the proper administration of federal law. Even if the Line Item Veto Act could be said to impair a distinct institutional interest of Congress itself, moreover, a suit brought by an individual Member cannot properly be characterized as one filed on behalf of Congress, at least in the absence of some affirmative congressional action authorizing the Member to sue on its behalf. That is

particularly true where (as here) the individual Members have attacked the constitutionality of a federal statute rather than seeking to vindicate the legal and policy judgments of Congress as a whole.

Even if Members of Congress possessed a judicially cognizable interest in the proper administration of federal law, appellees' suit could not go forward at the present time. Until the President has actually exercised his cancellation authority with respect to a particular appropriations bill, the potential of the Act to frustrate appellees' own legislative preferences is too speculative to constitute injury in fact. And while the existing uncertainty concerning the Act's constitutional status may affect the manner in which legislative negotiations are conducted, the bare desire to eliminate legal uncertainty is an insufficient basis for invoking the jurisdiction of a federal court.

II. The Line Item Veto Act does not violate Article I. Its title notwithstanding, the Act does not authorize the President to sign into law some provisions of an appropriations bill while "returning" other provisions to Congress. The President remains subject to the constitutional obligation to approve or disapprove, in its entirety, an appropriations bill presented to him by Congress. His cancellation authority under the Act comes into existence only after an appropriations bill has been passed by both Houses of Congress and approved, *in toto*, by the President.

The effect of the Line Item Veto Act is to vest the President with authority to determine, in accordance with statutorily prescribed standards and procedures, whether items of spending that Congress has appropriated will in fact be spent. That grant of authority is fully consistent with historical practice. From the beginning of the Republic, Congress has frequently conferred upon the

President substantial discretion over the expenditure of appropriated funds. The First Congress, for example, chose to fund the general operations of the federal government through lump-sum appropriations acts that did not require that the full amount of the appropriation be spent. The settled historical practices of Congress and the Executive Branch regarding spending discretion strongly support the political Branches' shared judgment that the Line Item Veto Act is constitutional.

This Court has repeatedly recognized that Congress may vest the Executive Branch with considerable discretion in the administration of federal laws. The Line Item Veto Act places constitutionally sufficient limits on the President's exercise of discretion over federal spending. The President must cancel items "in whole" rather than in part and must devote any cancelled amounts to deficit reduction. The Act also provides significant guidance to the President in his decision whether particular items should be cancelled.

Finally, the Line Item Veto Act does not vest the President with the power to repeal any portion of an appropriations law. This Court has repeatedly upheld federal statutes authorizing the President to suspend their provisions, grant exemptions from their requirements, or otherwise modify their operation. Like the statutes previously upheld, the Line Item Veto Act permissibly vests the President with executive rather than legislative power. The fact that the President's cancellation of a particular item is irrevocable unless overturned by Congress does not alter the constitutional analysis. Indeed, that feature of the Act limits rather than expands the scope of the President's authority. The fact that the President's cancellation authority is conferred by the Line Item Veto Act rather than by individual appropriations laws also lacks constitutional significance.

ARGUMENT

I. APPELLEES LACK STANDING TO CHALLENGE THE CONSTITUTIONALITY OF THE LINE ITEM VETO ACT

Article III of the Constitution confines the jurisdiction of the federal courts to actual "Cases" and "Controversies," and "the doctrine of standing serves to identify those disputes which are appropriately resolved through the judicial process." *Whitmore* v. *Arkansas*, 495 U.S. 149, 155 (1990).

> To satisfy the "case" or "controversy" requirement of Article III, which is the "irreducible constitutional minimum" of standing, a plaintiff must, generally speaking, demonstrate that he has suffered "injury in fact," that the injury is "fairly traceable" to the actions of the defendant, and that the injury will likely be redressed by a favorable decision.

Bennett v. *Spear*, No. 95-813 (Mar. 19, 1997), slip op. 6. "This Court has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court." *Allen* v. *Wright*, 468 U.S. 737, 754 (1984). Rather, Article III "requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' " *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982) (quoting *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 99 (1979)), and that he "stand[s] to profit in some personal interest" by a judgment in his favor, *Allen*, 468 U.S. at 766 (quoting *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 39 (1976)).

"[T]he 'case or controversy' requirement defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded." *Allen*, 468 U.S. at 750. The "require[ment] that the party seeking review be himself among the injured," *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 563 (1992) (quoting *Sierra Club* v. *Morton*, 405 U.S. 727, 735 (1972)), ensures that the federal courts resolve disputed legal questions "only in the last resort, and as a necessity in the determination of real, earnest and vital controversy," *Valley Forge*, 454 U.S. at 471 (quoting *Chicago & Grand Trunk Ry.* v. *Wellman*, 143 U.S. 339, 345 (1892)). Article III's case-or-controversy requirement thus protects the separation of powers by ensuring that the Judicial Branch does not exercise a general superintendence over the workings of the federal government. See *Allen*, 468 U.S. at 760 (abandonment of standing requirements "would have the federal courts as virtually continuing monitors of the wisdom and soundness of Executive action") (quoting *Laird* v. *Tatum*, 408 U.S. 1, 15 (1972)); see also *Defenders of Wildlife*, 504 U.S. at 576 (role of federal courts is to determine "the rights of individuals").

The legal questions presented by the Line Item Veto Act—whether the Act violates Article I by enlarging the President's veto power under the Presentment Clause or by vesting the President with the power to repeal federal laws—are assuredly suitable for judicial resolution. If and when the President exercises his cancellation authority, moreover, his action is likely to result in judicially cognizable injury to persons who would otherwise be the recipients of the cancelled funds or tax benefits. See, *e.g.*, *Train* v. *City of New York*, 420 U.S. 35, 40 (1975).[10]

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[10] Suits by potential recipients of federal funds would not be brought against the named defendants in this case, however, but

Persons whose monetary interests are adversely affected by the Act's implementation will possess the prototypical "concrete stake" in the outcome of litigation, and will therefore satisfy the requirements of Article III.

Appellees, however, allege a very different sort of injury. The complaint in this case alleges that

> [t]he Act directly and concretely injures [appellees], in their official capacities, by (a) altering the legal and practical effect of all votes they may cast on bills containing such separately vetoable items, (b) divesting [appellees] of their constitutional role in the repeal of legislation, and (c) altering the constitutional balance of powers between the Legislative and Executive Branches, both with respect to measures containing separately vetoable items and with respect to other matters coming before Congress.

J.A. 12. Those asserted injuries do not satisfy the case-or-controversy requirement.

A. Members Of Congress Will Suffer No Judicially Cognizable Injury As A Result Of The Implementation Of The Line Item Veto Act

As we explain above, a private litigant can invoke the federal judicial power only by demonstrating a concrete personal stake in the outcome of the dispute. The United States and its agencies, by contrast, routinely initiate litigation (including criminal prosecutions), or appeal adverse rulings, in order to vindicate a more generalized governmental and public interest in the effective administration of federal law and to fulfill the President's responsibility under Article II to "take Care that the Laws be faithfully executed." This Court has explained:

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against the agency or agency official charged with the expenditure of the monies in question. See *Train*, 420 U.S. at 40.

> Every government, entrusted, by the very terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter. The obligations which it is under to promote the interest of all, and to prevent the wrongdoing of one resulting in injury to the general welfare, is often of itself sufficient to give it a standing in court.

In re Debs, 158 U.S. 564, 584 (1895). See also, *e.g.*, *id.* at 584-586; *Coleman* v. *Miller*, 307 U.S. 433, 441-442 (1939); *SEC* v. *United States Realty & Improvement Co.*, 310 U.S. 434, 459-460 (1940); *INS* v. *Chadha*, 462 U.S. 919, 931 (1983); *Director, OWCP* v. *Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 132-133 (1995); cf. *Diamond* v. *Charles*, 476 U.S. 54, 62 (1986) ("[A] State has standing to defend the constitutionality of its statute."). Even where the named federal party is an individual government official, such a suit (or appeal) is properly regarded as one brought *on behalf of the government*, not as an effort to redress an injury done to the official in his individual capacity.[11]

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[11] In the context of suits brought *against* individual government officials, this Court has stressed the need for "careful adherence to the distinction between personal- and official-capacity suits." *Kentucky* v. *Graham*, 473 U.S. 159, 165 (1985). "Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of * * * law." *Ibid.* By contrast, official-capacity suits are in substance suits against the government, and seek relief (*e.g.*, the payment of public funds or the alteration of agency policy) against the government rather than the individual employee. See *id.* at 166; *Hafer* v. *Melo*, 502 U.S. 21, 25-26 (1991); *Dugan* v. *Rank*, 372 U.S. 609, 620 (1963).

Thus, federal courts are authorized to adjudicate private actions brought by plaintiffs who establish a concrete personal interest in the outcome of the dispute, as well as suits brought by governmental entities to vindicate the public interest in the enforcement of the laws. Appellees, however, lack standing to sue under either theory.

1. This Court has

> consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.

A similar distinction may be drawn between personal- and official-capacity suits (or appeals) brought *by* governmental actors. A federal officer or employee, whether or not authorized to conduct litigation on behalf of the United States, has standing to sue in federal court to vindicate such personal interests as an entitlement to federal pay or benefits. See, *e.g.*, *Bowsher* v. *Synar*, 478 U.S. 714, 721 (1986) (members of federal employees' union had standing to challenge the constitutionality of Gramm-Rudman-Hollings Act, based on showing that they would "sustain injury by not receiving a scheduled increase in benefits"); cf. *Powell* v. *McCormack*, 395 U.S. 486, 495-500 (1969) (suit concerning House of Representatives' refusal to seat elected Member was not moot where plaintiff retained claim for back salary). Where the alleged injury is the impairment of governmental functions, however, an official may invoke the jurisdiction of the federal courts only insofar as he is properly authorized to sue or appeal on behalf of the government. See *Bender* v. *Williamsport Area Sch. Dist.*, 475 U.S. 534, 543-545 & n.6 (1986) (individual school board member lacked standing to appeal where board decided against appeal of adverse judgment); cf. *Karcher* v. *May*, 484 U.S. 72, 77-78 (1987) (individuals who intervened in their capacities as presiding officers of New Jersey Legislature could not appeal in their other individual and professional capacities after losing their positions as presiding officers).

Defenders of Wildlife, 504 U.S. at 573-574. While recognizing that, "[i]n some fashion, every provision of the Constitution was meant to serve the interests of all," this Court has emphatically rejected "[t]he proposition that all constitutional provisions are enforceable by any citizen simply because citizens are the ultimate beneficiaries of those provisions." *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 226-227 (1974).

A private plaintiff could establish the existence of a case or controversy by demonstrating that the cancellation of a particular budget item (or limited tax benefit) would adversely affect his own economic interests. See pages 19-20, *supra*. A member of the public could not, however, obtain judicial review of an exercise of the President's cancellation authority by alleging that the cancellation had negated the vote of his own Senator or Representative; that it had subverted the will of Congress; or that it had improperly shifted the balance of power between the Legislative and Executive Branches. Any such allegation would present a "generalized grievance" plainly insusceptible of judicial resolution. *United States* v. *Richardson*, 418 U.S. 166, 171 (1974).

Appellees' claim to standing thus rests on the premise that a Member of Congress has a judicially cognizable personal interest in the proper performance of his legislative duties, in the execution of an Act of Congress, or in the maintenance of the constitutionally prescribed balance of power between the President and Congress, even though his constituents possess no such interest. That premise is contrary to first principles of representative democracy. As then-Judge Scalia explained,

> no officers of the United States, of whatever Branch, exercise their governmental powers as personal prerogatives in which they have a judicially cognizable

> private interest. They wield those powers not as private citizens but only through the public office which they hold. Whatever the realities of private ambition and vainglory may be, in contemplation of law their personal interest in full and unfettered exercise of their authority is no greater than that of all the citizens for whose benefit (and not for the personal benefit of the officeholder) the authority has been conferred.

Moore v. *U.S. House of Representatives*, 733 F.2d 946, 959 (D.C. Cir. 1984) (Scalia, J., concurring in result), cert. denied, 469 U.S. 1106 (1985). Because Members of Congress exercise their powers as representatives and servants of the people—the "ultimate beneficiaries" (*Reservists*, 418 U.S. at 226-227) of the constitutional provisions on which appellees rely—the President's cancellation of budgetary items pursuant to the Line Item Veto Act would cause them no injury that is not shared by the public generally. See also *United States* v. *Munoz-Flores*, 495 U.S. 385, 394-395 (1990) (fundamental purpose of separation of powers is "to protect individual rights"); *Bowsher* v. *Synar*, 478 U.S. 714, 721 (1986) ("The declared purpose of separating and dividing the powers of government * * * was to diffuse power the better to secure liberty.") (brackets and internal quotation marks omitted).[12] Cf. *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977) (association's

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[12] This analysis applies equally to suits brought by individual officials in the other Branches asserting impairment of their own governmental prerogatives. No one would suppose, for example, that a federal district judge would have standing to challenge statutory restrictions on the jurisdiction of the federal courts. The judge would also lack standing to petition for certiorari from a court of appeals decision reversing one of his rulings. Nor could the head of a Cabinet department assert standing to challenge an allegedly unlawful presidential directive regarding the exercise of his official duties.

standing to sue on behalf of its members requires, *inter alia*, that "its members would otherwise have standing to sue in their own right").

2. As we explain above (see pages 20-21 & note 11, *supra*), suits to vindicate generalized public interests may be brought by authorized federal officials acting "in their official capacities"—*i.e.*, on behalf of the government. For two reasons, however, appellees lack standing to sue on that basis.

a. Article II of the Constitution entrusts litigation on behalf of the United States to the Executive rather than the Legislative Branch. The "discretionary power to seek judicial relief" is "authority that cannot possibly be regarded as merely in aid of the legislative function of Congress. A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.'" *Buckley* v. *Valeo*, 424 U.S. 1, 138 (1976) (per curiam) (quoting U.S. Const. Art. II, § 3). Because Congress "may not 'invest itself or its Members with either executive power or judicial power,'" *Metropolitan Washington Airports Auth.* v. *Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 274 (1991) (*MWAA*) (quoting *J.W. Hampton, Jr., & Co.* v. *United States*, 276 U.S. 394, 406 (1928)), neither Congress nor its Members may initiate litigation designed to vindicate the general public and governmental interest in the proper administration of federal law. Cf. *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 800 n.10 (1987) (exercise of prosecutorial power by Congress would "eradicate fundamental separation-of-powers boundaries").[13]

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[13] The Court in *Chadha* stated that "Congress is the proper party to defend the validity of a [federal] statute when an agency of govern-

Separation-of-powers principles thus foreclose any contention that Congress suffers a judicially cognizable impairment of its lawmaking function if an Executive Branch official fails to give an enacted law its proper legal effect. Indeed, if Congress retained a judicially cognizable interest in the administration of laws that it had enacted, that interest would be equally threatened by private violations as by Executive Branch noncompliance. If Congress could define noncompliance with federal law as an injury to itself or its Members, it could usurp the President's constitutional responsibility for the execution of the laws.[14]

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ment, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is * * * unconstitutional." 462 U.S. at 940; see also *Arizonans for Official English* v. *Arizona*, 117 S. Ct. 1055, 1068 n.20 (1997); cf. *United States* v. *Lovett*, 328 U.S. 303, 304 (1946) (Congress appeared as amicus curiae after Solicitor General filed certiorari petition on behalf of the United States). In *Chadha*, however, the Immigration and Naturalization Service (INS)—while adhering throughout the litigation to the position that the challenged legislative veto provision was unconstitutional—had appealed from the court of appeals' decision invalidating that provision, and this Court held that the INS was a proper appellant. 462 U.S. at 929-931. In stating that Congress could appropriately appear in such circumstances to defend the constitutionality of the legislative veto provision, compare, *e.g.*, *Ornelas* v. *United States*, 116 S. Ct. 1657, 1661 n.4 (1996) (Court appointed private counsel to appear as amicus curiae in support of the court of appeals' judgment where neither the United States nor the private petitioner espoused the court of appeals' legal theory); *Cheng Fan Kwok* v. *INS*, 392 U.S. 206, 210 n.9 (1968) (same); *Lovett*, 328 U.S. at 304, the Court did not suggest that Congress would have had authority to appeal from the court of appeals' decision if the responsible Executive Branch officials had declined to do so. Cf. *Young*, 481 U.S. at 817 (Scalia, J., concurring in judgment) ("Even complete failure by the Executive to prosecute law violators, or by the courts to convict them, has never been thought to authorize congressional prosecution and trial.").

[14] Different considerations may be presented if Congress (or one House thereof) seeks judicial redress in aid of its legislative func-

b. Even if the Line Item Veto Act could be said to impair a distinct institutional interest of Congress itself, separate and apart from the generalized public interest in Executive Branch compliance with the Constitution and laws, appellees would lack standing to sue. A suit brought by an individual Member cannot properly be characterized as one filed on behalf of Congress, at least in the absence of some affirmative congressional action authorizing the Member to sue on its behalf. The federal legislative "[p]ower is not vested in any one individual, but in the aggregate of the members who compose the body, and [Congress's] action is not the action of any separate member or number of members, but the action of the body as a whole." *United States* v. *Ballin*, 144 U.S. 1, 7 (1892). Cf. *Bender* v. *Williamsport Area Sch. Dist.*, 475 U.S. 534,

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tions. See, *e.g.*, 2 U.S.C. 288b(b) (Senate Legal Counsel "shall bring a civil action to enforce a subpena of the Senate or a committee or subcommittee of the Senate * * * when directed to do so by the adoption of a resolution by the Senate"); cf. *McGrain* v. *Daugherty*, 273 U.S. 135, 174 (1927) ("[T]he power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function."); *Buckley*, 424 U.S. at 137-138.

The cancellation authority conferred on the President by the Line Item Veto Act, however, effects no interference with Congress's performance of its lawmaking functions. The Act deals only with the manner in which appropriations bills will be implemented *after* they have been enacted into law. That would be true, moreover, even if appellees and the district court were correct in characterizing the President's exercise of cancellation authority under the Act as the power to "repeal" portions of appropriations laws. A purported presidential repeal of an enacted law would prevent the law from being faithfully executed, but it would not prevent Congress from performing its own responsibilities. Because Congress has no constitutional role in the execution of enacted laws, see *Bowsher*, 478 U.S. at 733 ("once Congress makes its choice in enacting legislation, its participation ends"), it has no judicially cognizable interest in the Line Item Veto Act's constitutional status. Cf. *Buckley*, 424 U.S. at 139-140.

544 (1986) (appellant's status as member of school board "does not permit him to 'step into the shoes of the Board' and invoke its right to appeal"; "[g]enerally speaking, members of collegial bodies do not have standing to perfect an appeal the body itself has declined to take").

An Executive Branch official could not sue to vindicate the institutional interests of the agency at which he worked absent some showing of authority to litigate on its behalf. Cf. *FEC* v. *NRA Political Victory Fund*, 513 U.S. 88, 92-99 (1994). Nor could such an official evade the limitations on his governmental litigating authority by suing in his own name and recasting the alleged impairment of agency functions as a personal injury to himself. The same principles apply here.

Appellees' lack of standing is particularly clear in the instant case. Although appellees allege that the Line Item Veto Act "alter[s] the constitutional balance of powers between the Legislative and Executive Branches," J.A. 12, they do not seek to vindicate the legal or policy judgments of Congress as a whole. To the contrary, their suit involves a constitutional challenge to a law that was enacted by Congress and that has been defended in the district court and this Court by the Senate and House of Representatives as *amici curiae*. Under those circumstances, appellees cannot plausibly claim to have standing to represent the interests of the Legislative Branch.[15]

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[15] *Coleman* v. *Miller*, *supra*, is not to the contrary. In *Coleman*, 21 (out of 40) state senators brought a mandamus action in the Kansas Supreme Court. 307 U.S. at 436. The gravamen of their suit was that the State's Lieutenant Governor, as presiding officer of the Senate, had improperly cast a tie-breaking vote in support of ratification of a proposed amendment to the United States Constitution. *Id.* at 435-436. The state supreme court entertained the suit on the merits, concluded that the Lieutenant Governor was authorized to cast the deciding vote, and held on that basis that the proposed amendment had been properly

ratified by the Kansas Legislature. *Id.* at 437. The plaintiffs then sought review in this Court, which held that "at least the twenty senators whose votes, if their contention were sustained, would have been sufficient to defeat the resolution ratifying the proposed constitutional amendment, have an interest in the controversy which, treated by the state court as a basis for entertaining and deciding the federal questions, is sufficient to give the Court jurisdiction to review that decision." *Id.* at 446. Four Members of the Court would have held that the plaintiffs lacked standing. See *id.* at 460 (opinion of Frankfurter, J.).

Coleman is distinguishable from the instant case in three significant respects. First, the Court did not address the standing of federal legislators, nor did it hold that the plaintiffs would have had standing to bring their suit in federal court; it simply held that it had jurisdiction to review the state supreme court's decision where the plaintiffs' "interest in maintaining the effectiveness of their votes" had been "treated by the state court as a basis for entertaining and deciding the federal questions." 307 U.S. at 438, 446. Because the separation-of-powers principles applicable to the federal government are not binding upon the States, see, *e.g.*, *Karcher*, 484 U.S. at 82 (New Jersey Legislature was properly authorized under state law to represent the State's interest in litigation), *Coleman* is not controlling here. See *Moore*, 733 F.2d at 959 n.1 (Scalia, J., concurring in result). Second, the votes of the *Coleman* plaintiffs had legal significance as a bloc, since those votes "would have been sufficient to defeat the resolution" under the plaintiffs' view of the Constitution. 307 U.S. at 446. The *Coleman* plaintiffs therefore might plausibly have been regarded as acting on behalf of the legislature, and their entitlement to do so was a matter of state rather than federal law. Finally, *Coleman* involved an asserted impropriety in the process by which votes were counted within the state legislature, rather than a defect in the administration of a duly enacted law. In the federal sphere, the separation of powers among the Branches and the autonomy of the Senate and House of Representatives on internal matters such as voting (see U.S. Const. Art. I, § 5) preclude recognition of a comparable judicially cognizable interest on the part of individual Members of Congress.

B. Because The President Has Not Yet Exercised His Cancellation Authority Under The Line Item Veto Act, Appellees Can Identify No Actual Or Imminent Injury

Even if Members of Congress possessed a judicially cognizable interest in the proper administration of federal law, appellees' suit could not go forward. This Court has emphasized that "[a]llegations of possible future injury do not satisfy the requirements of Art. III. A threatened injury must be certainly impending to constitute injury in fact." *Whitmore*, 495 U.S. at 158 (internal quotation marks omitted); accord, *e.g.*, *Defenders of Wildlife*, 504 U.S. at 564 & n.2.[16] Appellees acknowledge (Resp. to J.S. 4) that the President has not yet exercised the cancellation authority conferred by the Line Item Veto Act. Rather, the gravamen of their suit is that the President will, in the future, employ that authority so as to frustrate the proper implementation of appropriations bills enacted by Congress. That claim is too speculative to provide a basis for federal jurisdiction.

The Line Item Veto Act, taken alone, has no legal effect on appellees or on any private actor. Nor does the Act restrict Congress's authority in fashioning future appropriations measures. Congress retains the power to provide that the Act shall not apply to a particular appropriations law. Congress may also provide that the President's cancellation authority does not apply to an

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[16] The requirement that a plaintiff's injury be "actual or imminent, not 'conjectural' or 'hypothetical,'" *Whitmore*, 495 U.S. at 155 (quoting *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 102 (1983)), is closely related to the requirement that the claim be "ripe" for adjudication. Cf. *Reno* v. *Catholic Social Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993) (noting that "ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction").

individual line item in an appropriations law that is otherwise subject to the Act. Conversely, Congress may vest the President with *broader* discretion in the administration of a particular appropriations bill—*e.g.*, by authorizing him to cancel budgetary items in part rather than in whole, or by permitting him to cancel items after the expiration of the initial five-day period. The Act simply establishes a "default rule," cf. *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 272 (1994): it defines the extent of the President's discretion in the administration of appropriations measures in the absence of an express contrary provision contained in a particular law.

Thus, even the *legal* effect of the Line Item Veto Act cannot accurately be assessed until a particular appropriations bill becomes a law. Only then can the scope of the President's discretion in administering that law be compared to the discretion that he would possess if the Line Item Veto Act were not on the books. The Act's *practical* consequences, moreover, cannot be determined until the President has exercised his cancellation authority. At the present time, it remains unclear when the President will invoke the cancellation authority contained in the Line Item Veto Act; what items of spending, or limited tax benefits, he will choose to cancel; and whether those items will be made effective again through a disapproval bill. It is, in particular, unclear when or whether legislative measures supported by appellees themselves will be cancelled pursuant to the Act's procedures. Thus, even if a Member of Congress could be said to suffer a judicially cognizable injury through the frustration of his own legislative preferences, no such injury is either present or imminent in the instant case.

In explaining its contrary conclusion, the district court stated that, "[b]ecause [appellees] now find themselves in a position of unanticipated and unwelcome subservience to

the President before and after they vote on appropriations bills, Article III is satisfied." J.S. App. 14a; see also *id.* at 12a ("Under the Act the dynamic of lawmaking is fundamentally altered. Compromises and trade-offs by individual lawmakers must take into account the President's item-by-item cancellation power looming over the end product."). Appellees are free, however, to vote and to participate in legislative negotiations on the basis of their own stated conviction that the Act is unconstitutional and that any exercise of the President's cancellation authority will therefore be a legal nullity. No alteration in "the dynamic of lawmaking" is compelled by the Line Item Veto Act. Rather, any such change will result from the fact that other participants in the legislative process do not share appellees' view that the Act is constitutionally deficient. See *Eastern Kentucky Welfare Rights Org.*, 426 U.S. at 42 ("case or controversy" requirement is not satisfied where plaintiff's injury "results from the independent action of some third party not before the court").[17]

Legislative deliberations frequently take place against a backdrop of substantial disagreement or uncertainty

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[17] The district court's reliance (see J.S. App. 13a) on *MWAA* was misplaced. Plaintiffs in *MWAA* asserted that the power of the MWAA's Board of Review to veto actions of the MWAA's Board of Directors was unconstitutional because the Board of Review was composed of Members of Congress, in violation of separation-of-powers principles. See 501 U.S. at 259, 262. Plaintiffs filed suit, however, *after* the Airports Authority had adopted a "master plan" for the construction of a new terminal at National Airport. See *id.* at 261-262. Plaintiffs "alleged that the master plan allows increased air traffic at National [Airport] and a consequent increase in accident risks, noise, and pollution." *Id.* at 264. Although the Court held that the plaintiffs were not required to await an actual exercise of the Board of Review's veto power before filing suit, see *id.* at 265 n.13, it did not suggest that the existence of the veto power was sufficient, standing alone, to constitute an injury in fact.

regarding the existing state of the law. Neither the President nor Congress (or its individual Members) could unilaterally obtain an advisory opinion from this Court or a lower federal court regarding the constitutionality of the Line Item Veto Act, even if the request for such an opinion was motivated by a desire to eliminate legal uncertainty about the manner in which they should exercise their respective powers and responsibilities. See Correspondence of the Justices, *reprinted in* 3 *The Correspondence and Public Papers of John Jay* 486-489 (H. Johnston ed. 1891); *Muskrat* v. *United States*, 219 U.S. 346, 354 (1911); *United States Nat'l Bank of Oregon* v. *Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 446 (1993). That issue is no more suitable for judicial resolution in its present posture merely because several individual Members of Congress have written their request in the form of a complaint and named as defendants two officers of the other political Branch who happen to hold a contrary view of the constitutional question.

II. THE LINE ITEM VETO ACT DOES NOT VIOLATE ARTICLE I OF THE CONSTITUTION

A. The Act Does Not Conflict With The Constitutional Requirement That The President Approve Or Disapprove *In Toto* A Bill Presented To Him By Congress

The Presentment Clause requires that "[e]very Bill" passed by Congress "shall, before it become a Law, be presented to the President." Art. I, § 7, Cl. 2.[18] When a bill

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[18] Article I actually has two Presentment Clauses: Article I, Section 7, Clause 2, which applies to "Bill[s]," and Article I, Section 7, Clause 3, which applies to all "Order[s], Resolution[s], or Vote[s] to which the Concurrence of the Senate and House of Representatives may be necessary." Clause 3 was adopted to prevent evasion of the presentment requirement "by the simple expedient of calling a proposed law a 'resolution' or 'vote' rather than a 'bill.'" *Chadha*, 462 U.S.

is presented to the President, the Presentment Clause gives him two options: if he "approve[s]" the bill, "he shall sign it," and if he does not approve the bill, "he shall return it, with his Objections to that House in which it shall have originated." *Ibid.*[19] If the President signs the bill, it becomes a law. If the President instead returns the bill, it does not become law unless two-thirds of each House vote to override the President's veto. As the district court correctly recognized, see J.S. App. 5a-6a & n.3, 18a-19a, the President is required to sign or return, *in toto*, a bill presented to him by Congress; he is not empowered to sign some portions of the bill and return others.

The Line Item Veto Act is consistent with that requirement. Its title notwithstanding, the Act does not authorize the President to sign into law some provisions of an appropriations bill while "returning" other provisions to Congress.[20] When a spending bill is presented to the President, he must "sign" or "return" it *in toto*. By its terms, the Act applies only to "bill[s] or joint resolution[s] that ha[ve] been signed into law pursuant to Article I, section 7, of the Constitution of the United States." ICA

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at 947. For the sake of simplicity, we refer exclusively to Clause 2 in the text, but the discussion applies equally to both Presentment Clauses.

[19] If the President neither signs the bill nor returns it within ten days, the bill "shall be a Law, in like Manner as if he had signed it," unless Congress has by its adjournment prevented the bill's return, in which case the bill "shall not be a Law." Art. I, § 7, Cl. 2; see generally *The Pocket Veto Case*, 279 U.S. 655 (1929).

[20] Although the word "veto" is commonly used to describe the President's power to "return" a disapproved bill to the House of Congress in which it originated, see *Chadha*, 462 U.S. at 925, the word "veto" does not appear in the Presentment Clause, or anywhere else in the Constitution. The presence of the term in the title of the Act has the same constitutional significance as the absence of the term from the Presentment Clause—none.

§ 1021(a) (2 U.S.C. 691(a)); J.S. App. 32a. When the President signs a bill, "[the] bill when so signed becomes from that moment a law." *La Abra Silver Mining Co.* v. *United States*, 175 U.S. 423, 454 (1899); *United States* v. *Will*, 449 U.S. 200, 224-225 & n.29 (1980) (President's signature marks "the precise time the statute became law").

Thus, the President's cancellation authority under the Act comes into existence only *after* the requirements of the Presentment Clause have been satisfied. See H.R. Conf. Rep. No. 491, 104th Cong., 2d Sess. 20 (1996) ("[T]he cancellation authority only becomes effective after the President has exercised the constitutional authority to enact legislation in its entirety."). The district court therefore correctly held that "statutes subject to cancellation will have been 'approved' [by the President] in accordance with the Presentment Clause." J.S. App. 20a.[21] Because the cancellation authority created by the Act does not prevent any portion of an appropriations bill from becoming law, it is fully consistent with the constitutional requirement that the President sign or return a presented bill *in toto*.[22]

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[21] A bill returned to Congress can be enacted into law if, but only if, it is subsequently approved by two-thirds of each House. U.S. Const. Art. I, § 7, Cl. 2. A presidential cancellation pursuant to the Line Item Veto Act, by contrast, can be overturned by new legislation passed by a simple majority of each House, see ICA § 1026(6) (2 U.S.C. 691e(6)); J.S. App. 49a-50a, subject to a possible presidential veto and subsequent override. That is the method that Congress is required to employ whenever it disapproves of the manner in which the Executive Branch has exercised discretionary authority conferred by statute. See *Chadha*, 462 U.S. at 954-955, 958.

[22] The requirement that the President must exercise his cancellation authority, if at all, within five days after the bill has become law is a proper mechanism by which Congress has limited the authority otherwise conferred by the Act upon the President to control spending. A prompt decision is necessary to avoid the potential disruption of

The cancellation authority vested in the President by the Line Item Veto Act may be similar, in practical effect, to the power that he would possess under a hypothetical statute conferring true item veto (*i.e.*, partial "return") authority.[23] That similarity does not, however, cast doubt upon the Act's constitutional status. The requirements imposed by the Presentment Clause—while designed to protect substantive values, see *Chadha*, 462 U.S. at 958 n.23 ("The legislative steps outlined in Art. I are not empty formalities.")—are procedural in nature. So long as

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federal spending programs that could arise from belated cancellations. It is hardly unprecedented for federal laws to require the Executive Branch to make determinations and exercise discretionary authority within a strictly limited period of time. For example, the Shipping Act of 1984 gives the President the power to suspend certain rate orders of the Federal Maritime Commission if he determines that a suspension is required "for reasons of national defense or foreign policy," but he must act within ten days after the receipt or effective date of the Commission order. 46 U.S.C. App. 1708(e). Similarly, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 authorized the Attorney General temporarily to employ specified transitional rules for the detention and release of criminal aliens, but only if she notified Congress within ten days of the enactment of the Act. Pub. L. No. 104-208, Div. C, § 303(b)(2), 110 Stat. 3009-586.

[23] The President's powers under the Act are markedly less sweeping, however, than those he would possess if the *Constitution* authorized him to "return" some portions of an appropriations bill while signing other portions into law. The Act expires by its terms on January 1, 2005, see Pub. L. No. 104-130, § 5, 110 Stat. 1212 (J.S. App. 59a), and it is subject to amendment or repeal at any time. Moreover, Congress retains the power to exempt particular appropriations bills (or individual items contained therein) from the coverage of the Act, see pages 30-31, *supra*, and thus retains ultimate control of the manner in which the Act is applied to an individual appropriations law. The Act also identifies certain findings that the President must make, and additional factors that he must consider, before exercising his cancellation authority. See pages 10-11, *supra*; pages 44-45, *infra*.

future appropriations laws are enacted in conformance with those procedural requirements, the Presentment Clause is satisfied.

Because the Line Item Veto Act governs the implementation of appropriations statutes *after* they have become law, rather than the process by which they are enacted, the Act presents no genuine Presentment Clause issue. Rather, the Act must be scrutinized under the standards governing statutory grants of discretion to the Executive Branch in its administration of duly enacted laws. The Act operates to make the specified spending and revenue items discretionary, rather than mandatory, where the President finds that the Act's criteria have been met.[24] The Act thus vests the President with authority to determine, in accordance with statutorily prescribed standards and procedures, whether items of spending that Congress has authorized will in fact be spent. As we explain below, that grant of authority is fully consistent both with historical practice and with this Court's precedents.

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[24] In discussing the effect of the Act on future spending bills, we use the terms "discretionary" and "mandatory" to distinguish between spending authority that the Executive Branch has discretion not to exercise and spending authority that the Executive Branch is legally obligated to exercise. Those terms are often used in a different sense in the federal budget process: "discretionary" spending signifies "programs that are subject to annual funding decisions in the appropriations process," while "mandatory" spending (also known as "direct" spending) means "all spending that is made pursuant to laws other than appropriations laws." Senate Comm. on the Budget, 104th Cong., 2d Sess., *The Congressional Budget Process: An Explanation* 5, 6 (Comm. Print 1996).

B. The Act Is Consistent With The Historical Understanding Of Congress's Power To Confer Spending Discretion On The Executive Branch

"Long settled and established practice is a consideration of great weight" in the adjudication of constitutional questions. *The Pocket Veto Case*, 279 U.S. 655, 689 (1929); see also *Mistretta* v. *United States*, 488 U.S. 361, 401 (1989) ("'traditional ways of conducting government * * * give meaning' to the Constitution") (quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring)). As we explain above, the conferral upon the President of substantial discretion over the expenditure of appropriated funds has been a recurring practice of Congress under the Spending Clause from the beginning of the Republic. See pages 2-6, *supra*; *Cincinnati Soap Co.* v. *United States*, 301 U.S. 308, 322 (1937) ("Appropriation and other acts of Congress are replete with instances of general appropriations of large amounts, to be allotted and expended as directed by designated government agencies.").

Congress has sometimes conferred that discretion in individual appropriations acts. At other times, Congress has given the President broad authority to withhold appropriated funds on a government-wide basis in order to pursue overarching budgetary goals of Congress's choosing. See pages 2-6, *supra*. When Congress has given the President discretion over appropriated funds, it often has chosen not to impose binding restrictions on how that discretion is to be exercised. Thus, when Congress has passed lump-sum appropriations bills, see *Lincoln* v. *Vigil*, 508 U.S. 182, 192 (1993), or when it has given the President general authority to reduce government spending below appropriated levels, see pages 5-6, *supra*, the President has been left largely free to exercise his own judgment

regarding which spending programs to reduce and how much to reduce them. The degree of authority vested in the President has varied from time to time, in response to changing legislative judgments about the need for Executive Branch discretion. The extent of the Executive Branch's spending discretion in any particular instance has always been regarded, however, both by Congress and by the courts, as a matter for Congress itself to decide through the legislative process.

The practices of the First Congress regarding Executive Branch spending discretion are particularly instructive. The acts of the First Congress "provide[] 'contemporaneous and weighty evidence' of the Constitution's meaning since many of the Members of the First Congress 'had taken part in framing that instrument.'" *Bowsher* v. *Synar*, 478 U.S. 714, 723-724 (1986) (quoting *Marsh* v. *Chambers*, 463 U.S. 783, 790 (1983)). As we explain above (see pages 2-3, *supra*), the First Congress chose to fund the general operations of the federal government through lump-sum appropriations acts that did not require the Executive Branch to spend the full amount of the appropriations. See, *e.g.*, Act of Sept. 29, 1789, ch. 23, § 1, 1 Stat. 95 (appropriating "a sum not exceeding one hundred and thirty-seven thousand dollars for defraying the expenses of the department of war").[25] The Members of the First Congress evidently saw no constitutional

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[25] The lump-sum appropriations passed by the First Congress did not vest the President with unlimited discretion over the use of the appropriated sums. Other statutes, such as those fixing the salaries of federal officers, required the expenditure of a portion of the appropriations. See, *e.g.*, Act of Sept. 11, 1789, ch. 13, §§ 1-2, 1 Stat. 67-68 (salaries of executive officers). Nevertheless, Congress left the President free to decide how (and whether) to spend the remainder of the appropriated funds.

impediment to vesting the Executive Branch with broad discretion over the disposition of appropriated funds.

Viewed against this historical background, the Line Item Veto Act can hardly be characterized as "revolutionary." J.S. App. 25a. Like its many statutory predecessors, the Act simply gives the President a measure of discretion over the expenditure of appropriated funds, discretion that may be exercised only in accordance with the procedural and substantive limitations imposed by Congress. In sum, the settled historical practices of Congress and the Executive Branch regarding spending discretion add "great weight," *The Pocket Veto Case*, 279 U.S. at 689, to the political Branches' shared judgment that the Line Item Veto Act satisfies the requirements of Article I.

C. The Act Does Not Delegate Legislative Power To The President

The district court held that the Act violates the Presentment Clause by vesting the President with legislative power—specifically, the power to repeal laws. See J.S. App. 24a-26a. That holding is incorrect. When the President employs the cancellation authority conferred by the Act, he is not exercising legislative power, but is carrying out his core Article II function of "faithfully execut[ing]" the laws.

1. The requirements of the Presentment Clause do not apply to the President's administration of enacted laws. As the Court explained in *Chadha*, "[e]xecutive action under legislatively delegated authority that might resemble 'legislative' action in some respects is not subject to the approval of both Houses of Congress and the President for the reason that the Constitution does not so require." 462 U.S. at 953 n.16. The lawmaking procedures required by the Presentment Clause are "not necessary as a check on the Executive's administration of the laws

because his administrative activity cannot reach beyond the limits of the statute that created it—a statute duly enacted pursuant to Art. I, §§ 1, 7." *Ibid.*

When the President acts, "he presumptively acts in an executive or administrative capacity as defined in Art. II." *Chadha*, 462 U.S. at 951. The Article II character of the President's actions does not change when, as here, the President is exercising discretionary authority in the implementation of federal laws. While Article I vests "[a]ll legislative Powers" in Congress (Art. I, § 1), it "do[es] not prevent Congress from obtaining the assistance of its coordinate Branches." *Mistretta*, 488 U.S. at 372. Instead, Congress is free to "leav[e] a certain degree of discretion to executive * * * actors" in the execution of federal laws. *Touby* v. *United States*, 500 U.S. 160, 165 (1991). Accordingly, this Court has long recognized that "no valid objection can be made" to "conferring authority or discretion [on the President] as to * * * execution [of a federal law], to be exercised under and in pursuance of the law." *Field* v. *Clark*, 143 U.S. 649, 693-694 (1892) (internal quotation marks omitted).

Although Congress may vest the Executive Branch with considerable discretion in the administration of federal laws, it may not—either expressly or in practical effect—delegate to other Branches the "lawmaking function" vested in it by Article I. See, *e.g.*, *Loving* v. *United States*, 116 S. Ct. 1737, 1744 (1996) ("[T]he lawmaking function belongs to Congress * * * and may not be conveyed to another branch."); *id.* at 1752 (Scalia, J., concurring in part and concurring in the judgment) ("Legislative power is nondelegable."); *Touby*, 500 U.S. at 165. Where Congress is alleged to have impermissibly delegated its legislative powers to other officials, "[t]he focus of controversy * * * has been whether the *degree* of generality contained in the authorization for exercise of executive or judicial

powers in a particular field is so unacceptably high as to *amount to* a delegation of legislative powers." *Mistretta*, 488 U.S. at 419 (Scalia, J., dissenting). The nondelegation doctrine thus protects the separation of powers by ensuring that the President's executive authority is not so broad and unconstrained as to amount to the exercise of legislative power.

In applying the nondelegation doctrine, this Court "has deemed it 'constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of th[e] delegated authority.'" *Mistretta*, 488 U.S. at 372-373 (quoting *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 105 (1946)). The touchstone of analysis is whether Congress has provided an "intelligible principle" for the exercise of executive discretion. *Mistretta*, 488 U.S. at 372; *J.W. Hampton*, 276 U.S. at 406. Applying the "intelligible principle" standard, the Court has repeatedly sustained the constitutionality of laws that vest the Executive Branch with discretion over the implementation of federal statutes and programs.[25] The Court has approved grants of discretionary authority "under [statutory] standards phrased in sweeping terms," *Loving*, 116 S. Ct. at 1750, sustaining the constitutionality of laws giving the Executive Branch the authority to regulate broadcast licensing as required

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[25] See, *e.g.*, *Loving*, *supra*; *Touby*, *supra*; *Skinner* v. *Mid-America Pipeline Co.*, 490 U.S. 212 (1989); *Mistretta*, *supra*; *FEA* v. *Algonquin SNG, Inc.*, 426 U.S. 548 (1976); *Lichter* v. *United States*, 334 U.S. 742, 785 (1948); *American Power & Light Co.*, *supra*; *Yakus* v. *United States*, 321 U.S. 414 (1944); *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944); *NBC* v. *United States*, 319 U.S. 190 (1943); *New York Central Securities Corp.* v. *United States*, 287 U.S. 12, 24 (1932); *J.W. Hampton*, *supra*; *Field*, *supra*; *Synar* v. *United States*, 626 F. Supp. 1374, 1383-1384 & n.9 (D.D.C.) (per curiam) (three-judge court) (citing cases), aff'd *sub nom. Bowsher* v. *Synar*, 478 U.S. 714 (1986).

by "public interest, convenience, or necessity," *NBC* v. *United States*, 319 U.S. 190, 194, 225-226 (1943); to approve consolidation of carriers "in the public interest," *New York Central Securities Corp.* v. *United States*, 287 U.S. 12, 24 (1932); to recover "excessive profits" on military contracts, *Lichter* v. *United States*, 334 U.S. 742, 778-786 (1948); to fix prices that "will be generally fair and equitable and will effectuate the purposes" of the law, *Yakus* v. *United States*, 321 U.S. 414, 420, 426-427 (1944); and to determine "just and reasonable" natural gas rates, *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 600-601 (1944).

2. It is far from clear that congressional appropriations of money are subject to the "intelligible principle" standard that generally applies to regulation of private conduct. This Court has observed that "certain categories of administrative decisions * * * traditionally have [been] regarded as 'committed to agency discretion.'" *Lincoln*, 508 U.S. at 191. "The allocation of funds from a lump-sum appropriation is" one such decision, since "a fundamental principle of appropriations law is that where Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions." *Id.* at 192 (internal quotation marks omitted). Lump-sum appropriations have been used throughout the Nation's history, and their constitutionality "has never been seriously questioned." *Cincinnati Soap Co.*, 301 U.S. at 322. So long as the activities on which appropriated funds are spent are themselves authorized by statute, and so long as the Executive Branch adheres to the constitutional directive that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law," Art. I, § 9, Cl. 7; see *OPM* v. *Richmond*, 496 U.S. 414, 424-425 (1990), we believe that no constitutional infirmity would exist even if

ar: appropriations statute placed no further constraints on Executive Branch discretion. Even if the "intelligible principle" standard articulated in *Mistretta* is assumed to apply in this context, however, the Line Item Veto Act places constitutionally sufficient constraints on the President's exercise of discretion over federal spending.

a. To begin with, the Act permits the President to cancel items only "in whole," ICA § 1021(a) (2 U.S.C. 691(a)); J.S. App. 32a, not in part, thereby requiring him to make "an all or nothing decision." H.R. Conf. Rep. No. 491, *supra*, at 33. And because the Act's "lockbox" feature (see page 10 & note 6, *supra*) requires that any cancelled amounts be devoted to deficit reduction, there is no authority to divert cancelled funds for other purposes. The Act's requirement that each budgetary item must be devoted either to a congressionally defined purpose or to deficit reduction is itself a substantial limitation on the President's discretion.

b. In addition, the Act provides significant guidance to the President in his choice between those two alternatives. The Act permits the President to cancel particular spending and revenue items only if he determines that cancellation will "(i) reduce the Federal budget deficit; (ii) not impair any essential Government functions; and (iii) not harm the national interest." ICA § 1021(a)(A) (2 U.S.C. 691(a)(A)); J.S. App. 33a. The Act thereby "establishes clear preconditions to Presidential action," *FEA* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 559 (1976), using criteria that are at least as "intelligible" as those previously approved by this Court. See pages 42-43 & note 26, *supra*.

The Act also requires the President to consider "the legislative history, construction, and purposes of the law which contains" the cancelled items as well as "any specific sources of information referenced in such law"; to provide his estimate of the "fiscal, economic, and budget-

ary effect" of the cancellation; to estimate the "effect of the cancellation upon the objects, purposes and programs for which the canceled authority was provided"; and to set forth the geographic distribution of the cancelled spending. ICA §§ 1021(b), 1022(b) (2 U.S.C. 691(b), 691a(b)); J.S. App. 33a-35a. By directing the President to consider those additional matters, Congress has offered further guidance as to the factors that should inform his decision. The requirement that the President articulate his assessment of the pertinent criteria provides an additional safeguard against arbitrary action. Cf. *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Finally, the Act places a substantial portion of the federal budget outside the scope of the President's cancellation authority altogether, by excluding spending for entitlement programs and other "direct spending" that results from previously enacted laws. ICA § 1026(8) (2 U.S.C. 691e(8)); J.S. App. 51a ("item of new direct spending" defined as "any specific provision of law that is estimated to result in an *increase* in budget authority or outlays for direct spending" over the budgetary "baseline") (emphasis added); see note 4, *supra*. Because "Congress [has] clearly delineate[d] the general policy, the public agency which is to apply it, and the boundaries of th[e] delegated authority," *Mistretta*, 488 U.S. at 372-373 (internal quotation marks omitted), the exercise of cancellation authority under the Act represents the Article II power to execute the laws of the United States, not the legislative power vested in Congress by Article I.[27]

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[27] The district court sought to distinguish the Line Item Veto Act from statutes previously upheld by this Court under the nondelegation doctrine on the ground that the Act "hands off to the President authority over fundamental legislative choices" and "spares Congress the burden of making those vexing choices of which programs to preserve and which to cut." J.S. App. 27a. The precise import of those state-

3. It is, of course, undisputed that "[a]mendment and repeal of statutes, no less than enactment, must conform with [the lawmaking requirements of] Art. I." *Chadha*, 462 U.S. at 954. The Line Item Veto Act, however, does not authorize the President to repeal legislation. Instead, by making individual items in spending legislation permissive rather than mandatory (see page 37, *supra*), it simply gives the President discretionary authority over the implementation of future appropriations acts. This Court's precedents make clear that this kind of power, exercised pursuant to statutory authorization, is not tantamount to legislative repeal under Article I.

a. In *Field*, importers challenged the constitutionality of a section of the Tariff Act of 1890 that authorized the President to "suspend" the Act's provisions (thereby raising tariffs) if the President determined that foreign governments were imposing "reciprocally unequal and unreasonable" tariffs on specified commodities. Act of Oct. 1, 1890, ch. 1244, § 3, 26 Stat. 612. The importers argued that the suspension provision unconstitutionally delegated lawmaking power to the President. 143 U.S. at 681. The Court rejected that contention, holding that "[t]he true [constitutional] distinction * * * is between the delegation of power to make the law * * * and

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ments is unclear. If the court meant that the fashioning of budgetary priorities is an inherently legislative (and thus nondelegable) function, the court's analysis cannot be squared with Congress's consistent (and heretofore unquestioned) practice of authorizing the Executive Branch to exercise considerable discretion over the expenditure of appropriated funds. Contrary to the district court's apparent belief (see *id.* at 27a-28a), it is neither unprecedented nor unconstitutional for Congress to give the President discretion over "which programs to preserve and which to cut." If the district court meant that the discretion conferred by the Line Item Veto Act is standardless or otherwise unduly broad, it was incorrect for the reasons stated at pages 44-45, *supra*.

conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law." *Id.* at 693-694 (internal quotation marks omitted).

The Court has also sustained the related congressional practice of vesting the Executive Branch with discretionary authority to create exemptions from federal laws or otherwise limit their scope. For example, the former Interstate Commerce Act, while generally prohibiting carriers from offering long-haul discounts, "gave an authority to the Interstate Commerce Commission * * * to grant relief from this prohibition," authority that was "undefined except as the general purposes of that Act implied the basis for affording exemption." *Addison* v. *Holly Hill Fruit Prods., Inc.*, 322 U.S. 607, 616 (1944). In the *Intermountain Rate Cases*, 234 U.S. 476, 486-489 (1914), the Court squarely rejected a claim that Congress had conveyed Article I legislative power to the Executive Branch by authorizing the Commission to create exemptions from the long-haul discount prohibition.

A wide variety of federal laws currently authorize the Executive Branch to suspend their provisions, grant exemptions from their requirements, or otherwise modify their operation.[28] When the Executive Branch suspends

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[28] See, *e.g.*, *Touby*, 500 U.S. at 162 (upholding statutory provision that authorizes Attorney General to remove substances from, as well as add substances to, statutory schedules of Controlled Substances Act); Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104-114, § 306(c), 110 Stat. 821-822 (to be codified at 22 U.S.C. 6085(c)) (authorizing President to suspend provision of Helms-Burton Act exposing foreign firms to civil liability for use of confiscated American property in Cuba); 5 U.S.C. 5303(b)(1), 5304a(a) (authorizing President to replace statutory formula for federal employee pay increases with formula chosen by President); 10 U.S.C. 7309(b) (authorizing President to make exceptions to ban on foreign construction of military vessels); 15 U.S.C. 78*l*(h) (authorizing SEC to "exempt in whole or in part any issuer or class of issuers" from

the operation of statutory provisions (as in *Field*) or otherwise modifies the operation of the statute (as in the *Intermountain Rate Cases*) pursuant to authority conveyed in the statute itself, no Presentment Clause problem arises: the President is simply exercising his Article II power to "faithfully execute" the law according to its terms. See *Field*, 143 U.S. at 693 (President's suspensory power "was a part of the law itself as it left the hands of Congress"). As noted above, the lawmaking procedures of the Presentment Clause are "not necessary as a check on the Executive's administration of the laws because his administrative activity cannot reach beyond the limits of the statute that created it—a statute duly enacted pursuant to Art. I, §§ 1, 7." *Chadha*, 462 U.S. at 953 n.16.

b. The district court found it significant (see J.S. App. 25a) that cancellation under the Act "rescind[s]" discretionary budget authority and renders items of new direct spending and limited tax benefits without "legal force or effect." ICA § 1026(4)(A)-(C) (2 U.S.C. 691e(4)(A)-(C)); J.S. App. 48a-49a. Contrary to the district court's suggestion, Congress's use of that terminology does not transform the President's cancellation authority into a power of statutory repeal. Indeed, this Court has previously discussed with approval statutory provisions phrased in similar terms. In *Field*, for example, this Court cited the example of a customs statute providing that specified tariff acts "shall be repealed" if the President declared that discriminatory foreign tariffs had been abolished. See 143 U.S. at 687 (citing Act of May 31, 1830, ch. 219, § 2, 4 Stat. 425). *Field* also cited an import statute authorizing the

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specified provisions of Securities Exchange Act of 1934); 47 U.S.C. 227(b)(2) (authorizing FCC to establish exemptions from federal ban on pre-recorded telemarketing calls).

President to "declare the provisions of this act to be inoperative, and the same shall be afterwards inoperative and of no effect from and after thirty days from the date of said proclamation." *Id.* at 688 (citing Act of Mar. 6, 1866, ch. 12, § 2, 14 Stat. 4). Far from regarding those statutes as constitutionally deficient, the Court cited them as historical support for the constitutionality of the tariff act at issue in *Field*. See also 28 U.S.C. 2072(b) ("All laws in conflict with" rules of practice and procedure promulgated by this Court "shall be of no further force or effect after such rules have taken effect."); *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 10 (1941); *Henderson* v. *United States*, 116 S. Ct. 1638, 1644 (1996); *Synar* v. *United States*, 626 F. Supp. 1374, 1387 (D.D.C. 1986), aff'd on other grounds *sub nom. Bowsher* v. *Synar*, *supra*.

c. Nor does any constitutional infirmity result from the fact that the President's cancellation of a particular item is irrevocable unless overturned by a subsequent disapproval bill.[29] There is, in particular, no basis for the district court's suggestion that this feature of the Line Item Veto Act effects a particularly "expansive * * * delegation[] of power." J.S. App. 25a. To the contrary, the discretion thus conferred is plainly *narrower* than would be the case if the President were authorized to revisit the question whether particular expenditures should be made.

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[29] Thus, while the decision whether to undertake a criminal prosecution "has long been regarded as the special province of the Executive Branch," *Heckler* v. *Chaney*, 470 U.S. 821, 832 (1985), prosecutorial officials may by their actions effectively preclude themselves from proceeding in a particular case—*e.g.*, by entering into a plea agreement, cf. *Santobello* v. *New York*, 404 U.S. 257 (1971), or by failing to obtain an indictment within the statutory limitations period. See also note 22, *supra* (examples of laws requiring that Executive Branch discretion be exercised, if at all, within a narrow period of time).

d. If a particular appropriations law explicitly gave the President the choice whether to spend or to impound specified sums of money, it could hardly be contended that the President's impoundment of funds effected a repeal of the law or subverted the will of Congress. The fact that the President's cancellation authority is conferred by the Line Item Veto Act rather than by individual appropriations laws does not alter the constitutional analysis. As we explain above, the Line Item Veto Act does not establish a rule of law that is binding on a future Congress regardless of legislative intent. Rather, the Act creates a "default rule" that budgetary items within its purview will be discretionary rather than mandatory to the extent provided by the Act. Congress retains the power, however, to render the Act's provisions inapplicable, or otherwise to alter the scope of the President's discretion, with respect to any particular appropriations bill. See pages 30-31, *supra*.

There is consequently no basis for appellees' assertion that, under the Line Item Veto Act, "the President's signature [on an appropriations bill] no longer signifies his approval of the whole [appropriations] Act as one he will faithfully execute." Resp. to J.S. 6. Because Congress is presumed to legislate with an awareness of existing law, see, *e.g.*, *Miles* v. *Apex Marine Corp.*, 498 U.S. 19, 32 (1990); *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 184-185 (1988), an appropriations bill that does not otherwise specify the scope of the President's discretion must be understood to authorize him either to spend, or to cancel, each item covered by the Act. Thus, when the President exercises the cancellation authority conferred by the Act, he is neither repealing an appropriations law nor refusing to "faithfully execute" it; he is administering it in accordance with its terms.

CONCLUSION

The judgment of the district court should be vacated and the case remanded with instructions to dismiss for lack of jurisdiction. Alternatively, the judgment of the district court should be reversed.

Respectfully submitted.

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APPENDIX

The Presentment Clause of the United States Constitution, Art. I, § 7, Cl. 2, provides as follows:

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.